

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 32

UNITED STATES PATENT AND TRADEMARK OFFICE

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PAT & T.M. OFFICE  
BOARD OF PATENT APPEALS  
AND INTERFERENCES

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte BRIAN D. POSSLEY

Appeal No. 2003-0246  
Application No. 09/262,458

ORDER REMANDING TO EXAMINER

On December 3, 2002, appellant filed a Request for a four month extension of time (Paper No. 30) and a Reply Brief (Paper No. 31), in response to the examiner's Answer entered May 24, 2002. It appears that the Reply Brief was untimely filed. 37 CFR § 1.193(b)(1) states:

Appellant may file a reply brief to an examiner's answer or a supplemental examiner's answer within two months from the date of such examiner's answer or supplemental examiner's answer. See § 1.136(b) for extensions of time for filing a reply brief in a patent application and § 1.550(c) for extensions of time for filing a reply brief in a reexamination proceeding.

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37 CFR § 1.136(b) reads as follows:

(b) When a reply cannot be filed within the time period set for such reply and the provisions of paragraph (a) of this section are not available, the period for reply will be extended only for sufficient cause and for a reasonable time specified. Any request for an extension of time under this paragraph must be filed on or before the day on which such reply is due, but the mere filing of such a request will not affect any extension under this paragraph. In no situation can any extension carry the date on which reply is due beyond the maximum time period set by statute. See § 1.304 for extensions of time to appeal to the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.645 for extensions of time in interference proceedings; § 1.550(c) for extensions of time in *ex parte* reexamination proceedings; and § 1.956 for extensions of time in *inter partes* reexamination proceedings.

As can be seen by appellant Request for four month extension of time, applicant filed his request under 37 CFR §1.136(a) not 37 CFR § 1.136(b). Accordingly, it appears that the Reply Brief is untimely filed. Accordingly, the examiner needs to determine if the Reply Brief is timely filed prior to entry of the Reply Brief. If the examiner determines that the Reply Brief is untimely filed, then the examiner needs to inform applicant that the Reply Brief is untimely, and will not be entered.

If, however, the examiner considers the Reply Brief timely filed, the examiner needs to consider the Reply Brief in accord to the procedure set forth in Manual of Patent Examining Procedure (MPEP) § 1208.03 (8<sup>th</sup> ed. August 2001) which states:

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[A]ppellant may file a reply brief as a matter of right within 2 months from the mailing date of the examiner's answer. . . . The primary must then either: (A) acknowledge receipt and entry of the reply brief by using form paragraph 12.47 on form PTOL-90; or (B) reopen prosecution to respond to the reply brief. See MPEP § 1208.02.

Accordingly, it is

ORDERED that this application be remanded to the examiner: 1) to determine whether or not the Reply Brief filed December 3, 2002 (Paper No. 31) was timely filed; 2) if the Reply Brief is determined to be untimely filed, written notification to applicant; 3) if the Reply Brief filed December 3, 2001 (Paper No. 31) is timely filed, consideration of the Reply Brief; 4) written notification of said consideration of the Reply Brief; and 5) for such further action as may be appropriate.

It is important that the Board of Patent Appeals and Interferences be informed promptly of any action affecting the status of this appeal (i.e., abandonment, issue, reopening prosecution).

BOARD OF PATENT APPEALS  
AND INTERFERENCES.

By:



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